No. 83-931

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

DON A. ALLEN, SR., STANLEY ARNOLD, HALE A. ASHCRAFT, JOHN C. BEGOVICH, RUTH CASEY, CLAYTON A. DILLS, FRANCES THELMA DONNELY, PEGGY P. DONOVAN, F. DOUGLAS FERRELL, MYRON H. FREW, MARY C. GAFFNEY, CHARLES B. GARRIGUS, LUTHER E. GIBSON, BURT HENSON, RUTH HOLMES, PAUL J. LUNARDI, STANLEY PITTMAN, THOMAS M. REES, EDWIN J. REGAN, W. BRYON RUMFORD, SR., HAROLD T. SEDGWICK, PHILIP SOTO, WILLIAM F. STANTON, VERNON STURGEON, WILLIAM SYLVONS, JR., HOWARD J. THELIN, JEROME R. WALDIE, ROBERT D. WILLIAMS, JOHN C. WILLIAMSON, GEORGE A. WILLSON, GORDON H. WINTON, JR., PEARCE YOUNG,
Appellants,

VS.

BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM,
Appellee.

On Appeal From Judgment of the Supreme Court of the State of California

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Appellants, California legislators who retired at the end of 1966 and presently are on pension based on their *highest salary during service,* plus annual cost-of-living adjustments, are claiming unconstitutional impairment of their "pension contracts" by a 1966 California constitutional amendment which permitted higher salaries after Appellants' retirement limited the computation base for Appellants' pensions to their *highest salary during service,* plus annual cost-of-living adjustments.

The question presented is, "Did the California Supreme Court correctly hold that the 1966 amendment did not impair Appellants' "pension contracts", because they *could not reasonably expect,* under the circumstances, that a dormant statute, which based pensions on *current legislative salaries* but was inoperative between 1954-1966, would suddenly apply to their pensions after the 1966 amendment nearly tripled the previously frozen legislative salaries?"

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I

JURISDICTION

The jurisdiction of the Court in this matter appears doubtful because Appellants' challenge is to a *judicial interpretation* of a California statute and constitutional

provision by the California Supreme Court. Appellants challenge the fact that the California Supreme Court followed a California precedent case which upheld Article IV, Section 4 of the California Constitution as amended in 1966. In essence, they challenge the decision because it allegedly did not follow the reasoning of a more recent California case that dealt with a different statute and different facts, rather than directly challenging a statute.

The appeal in this case presents nothing more than a claim of "impairment by judicial decision" which presents no federal question for which this Court can take jurisdiction.

II

STATEMENT OF THE CASE

Appellants are California legislators who retired on or before December 31, 1966 and since their retirement have received (and are now receiving) pensions based on the salary during their service which was fixed by the California Constitution until December 31, 1966. (California Constitution, Article IV, Section 2(b), as in force until December 31, 1966.) Their pensions were and are augmented by annual cost-of-living adjustments (California Government Code Section 9360.9, Jurisdictional Statement, Appendix, p.40).[1] The salary during Appellants' service was $6,000.00 on an annual basis. It could be increased only by a constitutional amendment. From 1954 until 1966, California voters voted down several attempts to increase the legislators' salaries. During the same period legislators' pensions could increase only if salaries in-

[1]All further references to statutes are to the California Government Code unless otherwise so stated. All references to the "Appendix" are to the Appendix attached to Appellant's Opening Brief.

creased. This never happened (Section 9359.1[a], Jurisdictional Statement, Appendix, p. 39).

In 1963 the California Legislature enacted California Government Code § 9360.90 (Jurisdictional Statement, Appendix, p. 40). This section gave Appellants a so-called "catch-up" on the cost-of-living increases that had occurred since 1954, in addition to giving them annual cost-of-living adjustments from January 1, 1964, onwards, which they are today receiving.

The provision of the Legislators' Retirement Law which tied pension increases to salary increases (Section 9359.1[a], Jurisdictional Statement, Appendix, p. 39), continued to be on the statute books, but had no effect since salaries were not increased.

In 1966 (effective January 1, 1967), the voters of California approved a constitutional amendment which gave the Legislature the power to set its own salaries by two-thirds majority vote. At the same time the amendment provided that the pensions of the legislators who had served before January 1, 1967 would not be based on the new higher salaries. (California Constitution, Article IV, Section 4, "Jurisdictional Statement", Appendix, p. 38-39). Legislation implementing this constitutional amendment, likewise became effective January 1, 1967. (Section 9359.11, Jurisdictional Statement, Appendix, p. 40, and Section 8901, setting legislative salaries at $16,000 per year, effective Jan. 2, 1967).

This constitutional amendment and the implementing legislation originated in the very Legislature in which Appellants then served.

The Legislature, however, did not, in 1966, restrict the basic pensions of constitutional officers of the State to the highest salary during service, but left the basic pension subject to adjustment by tying it to the salary of the current incumbent. (Section 9359.1[b]).

None of the Appellants retired after January 1, 1967. Between that time and prior to the institution of this lawsuit in 1979, Appellants claimed and received their pensions and cost-of-living adjustments based on the salaries at which they had served.

In 1969, the widow of a legislator (Lyon) who had retired in 1966 and had received a pension based on the $6,000.00 annual salary, augmented by cost-of-living increases, claimed that she was entitled to a pension based on the new $16,000.00 salary for legislators which became effective January 2, 1967. She brought suit alleging that the 1966 amendments to the California Constitution which limited the base of her pension to the $6,000.00 annual salary were repugnant to the "contract clause" of the United States Constitution (*Lyon v. Flournoy,* (1969) 271 Cal.App. 2d 774, at 779).

The California Court of Appeal held that the 1966 amendments were not an impairment of Lyon's pension contract, notwithstanding that during Lyon's term of service Section 9359.1(a), which tied pension increases to salary increases, had been on the statute books. The section had been "dormant" (*Lyon v. Flournoy, supra,* at 785) since the voters had declined to raise salaries. The California Court of Appeal stated that the purpose of Section 9359.1(a) had been achieved by the enactment of Government Code Section 9360.9 which provided the standard of

living "catch-up" from 1954 through 1963 and the annual cost-of-living adjustment from 1964 onward. The 1966 amendments, by denying the pre-1967 retired legislators pensions based on the new $16,000.00 salary, merely withheld from them an unanticipated windfall (*Lyon, supra,* at 785, 787).

The California Court of Appeal relied for their decision on principles stated by this Court:

> "The beneficiaries' rights were measured not by rigid literal fulfillment of the contract, but by its 'just and reasonable purport'. (*Home Building & Loan Assn. v. Blaisdell* . . . 290 U.S. at 429 . . .) The law making power chose to confine beneficiaries to the gain 'reasonably to be expected from the contract' and to withhold 'unforeseen advantages' which had no relation to the real theory and objective of the fluctuation provision. (*City of El Paso v. Simmons,* 379 U.S. at 515 . . .)." (*Lyon v. Flournoy, supra,* at 787.)

In 1978 the California Supreme Court decided in *Betts v. Board of Administration,* (1978) 21 Cal.3d 859, that Betts, a former State Treasurer, under a wholly different set of circumstances, had a reasonable expectation of receiving a pension based on the salary of the current incumbent State Teasurer, plus a cost-of-living adjustment, instead of a pension based on Betts' highest salary level while he served in office, Betts' final term of office had expired December 31, 1966. In 1974 the California Legislature amended Section 9359.1(b) in a way which would have limited Betts to a pension based on the highest salary at which he served, plus a cost-of-living adjustment. It was their amendment that the California Supreme Court found to be an impairment of Betts' "pension contract" under the

circumstances of his case. The Court, however, reached that conclusion reluctantly. A pension based on the current incumbent's salary (which presumably compensates the incumbent for cost-of-living increases) *plus* an annual cost-of-living adjustment was found to be "a *double* increment of increase" and to be a "troubling result". (*Betts, supra,* at 867). The clear question of legislative intent as to constitutional officers in the *Betts* case was not available and the Court felt compelled to conclude:

> "We can only observe that the Legislature *must have intended* to provide such benefits to constitutional officers serving between 1963 and 1974 because it left in effect both of the formulae during that 11-year period." (Emphasis added.) (*Betts, supra,* at 867.)

Within a few months after the *Betts* decision became final Appellants filed claims with the Board for recomputation of their pensions based on the salaries of current incumbent legislators. After an administrative hearing on June 22, 1979 the Board declined Appellants' request, Appellants prayed for and obtained a Writ of Mandate from the Superior Court of Los Angeles County, the California Court of Appeal, Second District affirmed, but the California Supreme Court granted the Board's Petition for Hearing and reversed the Judgment of the trial court. This Appeal followed.[2]

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[2]Under the California Rules of Court, when the Supreme Court grants a Petition for Hearing the cause is transferred from the Court of Appeal to the Supreme Court and the decision of the Court of Appeal does not have precedential effect and is not published in the Official Reports. Rule 28, Rule 976[a].

III

THE APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

A. The California Supreme Court Applied Contract Clause Principles Stated By This Court

In *Allen et al. v. Board,* (1983) 34 Cal.3d 117 (Jurisdictional Statement, Appendix, p.1-19), the California Supreme Court followed California precedent (*Lyon v. Flournoy, supra*) in holding that Article I, Section 4 of the California Constitution, as amended in 1966, *did not* unconstitutionally impair the "pension contract" of Appellants. In reaching its decision the Court followed the principles stated in the decisions of this Court:

> (1) "The prohibition [of the federal contract clause] is not an absolute one and is not to be read with literal exactness like a mathematical formulae" (*Home Building & Loan Assn. v. Blaisdell* (1934) 290 U.S. 398, 428)
>
> (2) "Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding they technically alter an obligation of a contract" (*City of El Paso v. Simmons* (1965) 379 U.S. 497 at 515)
>
> (3) "The constitution is 'intended to preserve practical and substantial rights, not to maintain theories'" (*Faitone Iron & Steel Co. v. City of Asbury Park* (1932) 316 U.S. 502, 514, as quoted in *City of El Paso, supra,* at 515)

By challenging the California Supreme Court's decision Appellants are challenging these principles:

(1) Contrary to the first principle stated above, Appellants are urging this Court to read the California statutes on the books in 1966 with "literal exactness" as follows:

(a) Section 9359.1(a) was on the books in 1966 and provided as pension computation base the salary of the current incumbent.

(b) Section 9360.9 was on the books in 1966 and provided for cost-of-living adjustments to legislators' pensions by a "catch-up" from 1954-1963 and regularly thereafter from 1964 onwards.

(c) Since both were on the books both must be applied from here to eternity. The people of the State of California may not take into consideration that the annual cost-of-living adjustment and the "catch-up" were enacted *because* there was no effective pension increase under Section 9359.1(a) from 1954 to 1963.

(2) Contrary to the second principle stated above, Appellants are urging this Court to hold that during their term of service until December 31, 1966 Appellants had the *reasonable expectation* that they would receive:

(1) a pension computed on current incumbents' salaries as soon as legislators' salaries would be raised under any circumstances and for reason whatsoever, at at any time in the future;

(2) *plus* a "catch-up" for the lack of pension increase from 1954-1963;

(3) *plus* a regular annual cost-of-living increase based on current incumbent legislators' salaries.

(3) Contrary to the third principle stated above, Appellants are urging this court to maintain the theory that when two statutes are in existence at the same time and both on their face provide a benefit, then the persons mentioned as beneficiaries are, by force of the Federal Contract Clause, entitled to both benefits regardless of the legislative intent and actual operation of these statutes and regardless of reason and common sense.

Appellants are at present receiving substantial pensions augmented by annual cost-of-living increase adjustments. They have received these pensions for these past seventeen years. There is no substance to their claim that their pension contracts are impaired. This is so because their pensions are based on their highest salary during service, together with the "catch-up" for cost-of-living from 1954-1963, plus the annual cost-of-living adjustments since 1964. They are not based on a formula which was of no effect during the twelve years before Appellants' retirement and which were never intended to apply simultaneously with a full scale cost-of-living protection mechanism such as Section 9360.9.

The decisions of this Court make it clear that the Federal Contract Clause permits to the states a necessary exercise of police power even over contracts protected by the clause. In this connection, "the economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts." (*El Paso v. Simmons, supra,* at 508, quoting *Home Building & Loan Assn. v. Blaisdell,* 290 U.S. at 434-435, 437.)

As permitted by these principles, the California Supreme Court considered the fiscal consequences resulting to the people of the State from Appellants' claim. Appellants had contributed 4% of their $6,000.00 annual compensation to the retirement fund. To pay these pensions based upon current salaries would have required, as the California Supreme Court pointed out, "excessive appropriations of general tax funds to maintain the retirement system's fiscal integrity" (Jurisdictional Statement, Appendix, p. 14). The

California Supreme Court found that to give Appellants pensions based on the $16,000.00 annual salary:

> "would give them a bonanza far outstripping any reasonable expectation for cost-of-living increases" and "also would afford them pension dwarfing their relatively modest contributions to the Legislators' Retirement System" (Jurisdictional Statement, Appendix, p. 14).

These fiscal considerations further negate Appellants' claim that their expectations of these multiple cost-of-living adjustments to their pensions were in any way reasonable.

B. The California Supreme Court Followed Applicable California Precedent

Lyon v. Flournoy, supra on which the California Supreme Court relied in its decision in the instant case construed Article IV Section 4 of the California Constitution, as amended 1966, and the 1966 implementing legislation concerning salaries and pensions of California legislators. *Lyon* is thus a "precedent" in the truest sense of the word involving the same constitutional and statutory provisions and involving the claim of a retired legislator regarding these provisions.

Betts v. Board of Administration, supra, construed the 1974 amendment to Section 9369.1(b) which governs the pension rights of constitutional officers such as the office of State Treasurer in which Betts served. The salaries of constitutional officers had been set beginning in 1961 by the Legislature under Article V, Section 22 (as amended November 8, 1960) and later Article V, Section 12 (as enacted November 8, 1966) of the California Constitution. As the

California Supreme Court clearly pointed out (Jurisdictional Statement, Appendix, p. 12) the circumstances in *Betts* were altogether different and in particular there was no history of an inoperative pension increase statute surviving, "dormant," on the statute books while its intended purpose was being achieved by a new statute providing for a "catch-up" for past cost-of-living increases as well as making provision for future cost-of-living increases.

Therefore, to argue as Appellants do, that following the *precedent* of *Lyon* and declining to apply *Betts* to the different circumstances of legislators' pensions presented by the instant case was "an improper and unwarranted departure from the applicable state court precedent" (Jurisdictional Statement, p. 9) is, in a word, nonsense. *Lyon* is the *precedent* (legislators' pensions, 1966 amendment of Article IV, Section 4 of the California Constitution), *Betts* is not (pensions of constitutional officers; 1974 amendment of Government Code Section 9359.1[b]).

Indiana ex rel. Anderson v. Brand, (1937) 303 U.S. 95, cited by Appellants is inapposite. In that case the Indiana Supreme Court departed from a long line of its prior cases which:

> "had uniformly held that the teacher's right to continued employment by virtue of the indefinite contract created pursuant to the Act was contractual." (*Indiana, supra,* at 105).

In the instant case the California Supreme Court did the opposite: it adhered to the precedent of *Lyon v. Flournoy* (supra).

C. Conclusion

The "impairment" Appellants are urging this Court to consider thus consists of the decision of the California Supreme Court to follow applicable California precedent and to follow the principles announced by this Court all of which compelled the California Court to deny to Appellants the windfall claim they have made.

Appellants' claim thus does not amount to a substantial federal question and this Appeal accordingly should be dismissed.[3]

IV

THE APPEAL PRESENTS NO FEDERAL QUESTION

Appellants are, primarily, attacking a *judicial decision*, rather than a "law" of the State of California. The tenor of their "Jurisdictional Statement" is that the California Supreme Court should have followed "the reasoning and holding" of the *Betts case*. (Jurisdictional Statement, p. 13; see also p. 6, p. 9, 17-18.) The reasoning of *Betts*, i.e., the inference from the simultaneous existence of the two statutes that both had to apply simultaneously, is referred to as "controlling". (Jurisdictional Statement, p. 13, 14, 18.) The entire difference between the constitutional and statutory scheme of salaries and pensions for legislators vis-a-vis salaries and pensions for constitutional officers is brushed aside. Nothing counts in Appellants' argument except that two statutes were simultaneously on the books in *Betts* and so, since in *Betts* the two statements were held to be simultaneously in force, two statutes simultaneously on the books must in all cases, under any circumstances, and at all times, be held to be simultaneously in force.

[3] If this appeal is treated as a Petition for Writ of Certiorari the Petition should be denied.

Appellants' entire attack on the California Supreme Court's decision in the instant case is focused on this argument. What the statutes say, what their legislative history and intent may be is brushed aside by them as irrelevant. The error of the California Supreme Court was to fail to recognize Appellants' "simultaneity rule" and to apply it in the instant case. In this, Appellants are attacking purely a point of legal reasoning, of the rules governing the application of case law. Their "precedent" (*Betts*) does not even involve the same constitutional and statutory provisions on which the California Supreme Court decided the instant case.

It is therefore clear Appellants are attacking a *judicial decision* as causing the impairment of their "pension contracts".

It has been settled for close to 140 years that alleged impairment of contract by judicial decision raises no federal question: ". . . the power delegated [to the U.S. Supreme Court] is for restraint of unconstitutional legislation by the states, and not for the correction of alleged error committed by their judiciary". (*Commercial Bank of Cincinnati v. Buckingham*, (1847) 46 U.S. 317. "The contract clause of the Constitution, as its words show, is directed against impairment by legislative action, not against a change in judicial decision." *Rooker v. Fidelity Trust Company*, (1923) 261 U.S. 114 at 118.[4]

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[4]While this Court has examined state judicial decisions affecting contracts in cases arising through diversity jurisdiction, this Court has "in cases . . . of which it obtains jurisdiction only on the constitutional ground [impairment of contract] and by appeal from a state court, . . . always adhered in terms to the doctrine that the word 'laws' as used in Article I, § 10, does not comprehend judicial

The California Supreme Court's construction of Article IV, Section 4 of the California Constitution, as amended 1966, is so far removed from Appellants' incessant arguments that *Betts* is "controlling" (Appellants' simultaneity rule), it is so far removed that the important case falls into the category of cases decided by Chief Justice Taft in *Tidal Oil Co. v. Flanagan,* (1923) 263 U.S. 444, at 453-545, "wherein it is claimed that a state court judgment alone, and without any law, impairs the obligation of a contract."

We respectfully submit that Appellants' attack on the judgment of the California Supreme Court in the instant case falls into that category of cases which present no federal question at all, because they attack an alleged error in a judicial decision rather than unconstitutional legislation by a state. In the absence of a federal question this Court would not have jurisdiction over this matter.

V

THE ARGUMENTS FOR GRANTING A PENSION WINDFALL TO APPELLANTS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT

As shown under III and IV, Appellants, after some thirteen years of evident contentment with their pensions, opportunistically seize upon the decision of the California Supreme Court in *Betts v. Board of Administration, supra.* In doing so, they have totally ignored the basis of

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decisions." The Constitution of the United States of America, Analysis and Interpretation, Congressional Research Service, Library of Congress, ed. Lester S. Jayson, U.S. Government Printing Office, Washington: 1973, at p.385.

the decision below, namely the legislative history and the legislative intent of the statutes in question.

Appellants' tenacious insistence that the California Supreme Court must disregard a carefully reasoned precedent construing the constitutional and statutory provisions which control the pension rights of retired legislators like Appellants is so insubstantial as not to need further argument.

VI
CONCLUSION

We respectfully submit that the Judgment of the California Supreme Court should be affirmed.

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